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No. 800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SUBURBAN TELEPHONE COMPANY, a corporation,
Appellant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

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Pursuant to Rule 16, Appellee The Mountain States Telephone and Telegraph Company moves to dismiss the appeal from the final judgment of the Supreme Court of the State of New Mexico on the following grounds:

1. The appeal is not within the jurisdiction of this Court because:

A. The appeal is not taken in conformity to the rules of this Court and specifically Rule 15(d).

B. There is no statutory basis for jurisdiction.

2. The federal question sought to be reviewed was

not timely or properly raised, properly pursued or expressly passed on in the state courts.

3. The appeal does not present any substantial federal question.

4. The judgment rests on an adequate non-federal basis.

STATEMENT

Appellant, Suburban Telephone Company (hereinafter, Suburban), is a New Mexico corporation and a subsidiary of a holding company, Universal Telephone Corp. One of the Appellees, The Mountain States Telephone and Telegraph Company (hereinafter, Mountain States), is a Colorado corporation authorized to conduct a general telephone business in New Mexico and other states in the mountain area. Other Appellees not referred to in the title and not discussed in Appellant's Jurisdictional Statement are a group of private citizens and residents of northern Catron County, New Mexico, who appeared individually and collectively and participated in the proceedings in the New Mexico courts through independent counsel.

Fundamentally, this entire litigation involves only two issues: First, what is the proper interpretation to be given to the term "field or territory" as used in New Mexico Statutes Annotated, 1953, § 69-8-1 (section is quoted pp. 21-22, Applt's Jur. Stat.); i.e., what are the proper geographical limits of such "field or territory"? Second, which of the two competing companies was first in time to establish service within the "field or territory" so fixed? Both parties relied upon the same sections of the statute (N.M.S.A., 1953 §§ 69-8-1 through 69-8-3). The findings of the New Mexico courts were that the "field or territory" comprised all of northern Catron County, and that Mountain States was first to serve this territory.

Under these circumstances, the United States Supreme Court on appeal will not review findings of fact first established by the trial court and later approved by the highest appellate court of the state. Unless this Court, contrary to its previous decisions (discussed post), reopens approved findings of fact, the only remaining inquiry to be pursued by this Court involves alleged invasion of Suburban's federal constitutional rights. At no point in the litigation in the state courts did Suburban ever contend a violation of its constitutional rights, by virtue of the granting of injunctive relief to Mountain States, *until* these constitutional questions were first raised by Suburban in its Motion for Rehearing (R. Vol. VII, pp. 1386-1388) directed to the New Mexico Supreme Court. The only question before this Court is whether Suburban—having had its day in court and having been enjoined from invading the territory of another utility—may now claim a violation of constitutional rights.

Mountain States has no objection to Suburban's description of the beginnings of Suburban by incorporating in New Mexico and purchasing communication facilities from the Indian Service. The important point is that in all of these original efforts, the activity of Suburban was limited to points in McKinley and Valencia counties, and there was no difficulty between the parties until Suburban extended its facilities southward into northern Catron County—a territory claimed by Mountain States.

Before this litigation was initiated, there was in existence a contract between the same parties dated March 21, 1961, specifying the particulars and payments to be made from Mountain States to Suburban for interchanged long-distance business (R. Exh. J, Vol. II, pp. 273-292). In that contract, the following clause appears: "The Independent Company will not, without the written consent of the Bell Company, connect the toll lines of the Bell Company with any toll lines other than those indicated in 'Ex-

hibit A.'" Exhibit A, attached to this contract, shows the diagram of Suburban's toll lines to be interconnected with Mountain States and the point of interconnection; namely, between Zuni and Gallup, New Mexico. Suburban's Zuni and other exchanges are all located in McKinley and Valencia Counties in New Mexico and there is nothing in this contract permitting interconnection of Suburban's toll lines between Gallup and any point in Catron County.

As to the original installations referred to as the Zuni system, located at Black Rock and other points in Valencia and McKinley Counties, extending as far south as Fence Lake, the normal Mountain States-independent company relations existed, with Mountain States providing toll connections to the intrastate and interstate network for Suburban exchanges through Mountain States' Gallup Exchange (R. Vol. III, pp. 425, 449; Exh. 28-38, Vol. IV, pp. 986-998; Exh. H, Vol II, p. 271; Exh. O, Vol. VI, pp. 1042-1043; Exh. S, Vol. VI, p. 1047).

When it came to the attention of Mountain States that Suburban was, in fact, extending its lines into the town of Quemado and the surrounding rural area, more specifically described as the Quemado Exchange area in a filing with the State Corporation Commission (R. Exh. 11, Vol. VI, pp. 943-945), Mountain States discontinued any further work in that area and commenced litigation on July 25, 1961; the intent being to have the issue of the contested area resolved by the courts.

A complaint was filed in the New Mexico District Court of Catron County seeking a finding that Mountain States was rendering utility service in the town of Quemado and surrounding rural area and an order enjoining Suburban from constructing, owning or operating facilities or providing service in said municipality, field or territory. In the alternative, in the event the court found Mountain States was not first in the area, the Complaint

sought a certificate of convenience and necessity pursuant to Section 69-8-1 (R. Vol. I, pp. 1-13).

Suburban thereupon answered the Complaint denying the allegations of Mountain States, and asserted a counterclaim (relying on the same New Mexico statutes that it is now attacking) asking for the issuance of an injunction against the construction, ownership or operation by Mountain States of telephone service, either local or long-distance, in the field or territory claimed by Suburban (R. Vol. I, pp. 14-23).

The trial court found, as a matter of fact, the Suburban was first in Quemado, but that all northern Catron County running along Highway 60 in an east-west direction, *including Quemado*, was one field or territory within the meaning of the New Mexico statute, that Mountain States was first in this territory, and that the majority of the residents of the territory desired Mountain States to serve them. (R. Vol. I, pp. 92-95) However, the trial court did not grant either party the injunction sought. Upon appeal of Suburban and the cross-appeal of Mountain States, the Supreme Court of New Mexico remanded to the trial court with instructions to grant the injunction sought by Mountain States. It is from this decision that Suburban appeals.

REASONS FOR DISMISSING THE APPEAL

I. The Appeal is Not Within the Jurisdiction of This Court.

A. *The Appeal is Not in Conformity to the Rules of This Court, and Specifically Rule15(d)*

Rule 15(d) of the Revised Rules of the Supreme Court of the United States provides, in part, as follows:

> "If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate

> court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them. . . ; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on this court."

Appellant's Jurisdictional Statement is devoid of even an attempt to comply with this rule. Appellant has not shown when or how any constitutional questions were raised, and has referred to no rulings by the trial court or the Supreme Court of New Mexico on any such constitutional questions.

In the absence of a showing that there was a ruling of the state court of a nature to bring the case within this Court's jurisdiction, the appeal should be dismissed. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); Rule 16(a) Revised Rules of the Supreme Court of the United States.

B. *There is no Statutory Basis for Jurisdiction*

The jurisdiction of the Supreme Court of the United States to review on appeal a final judgment of a state appellate court is defined and limited by Section 1257, Title 28, U.S. Code. Subsection (2) confers jurisdiction on appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." This is the section relied upon by Suburban.

In cases appealed from state courts, involving state laws, the statute confers jurisdiction in one class of cases and in no other. To come within that class an appellant

must show that it has drawn in question, on constitutional grounds, the validity of a state statute, that the question was expressly passed upon by the state court, and that the statute was found valid.

The statute involved (N.M.S.A., 1953, §§ 69-8-1 through 69-8-3) is quoted in full in the Opinion of the New Mexico Supreme Court (reproduced in Suburban's Jurisdictional Statement, pp. 42-43). Briefly, it provides that no telephone plant or equipment may be constructed or operated in a field or territory where there is in operation other plant or equipment, unless the district court finds that the public convenience and necessity require the second system.

Neither the opinion of the New Mexico Supreme Court nor the findings and judgment of the trial court expressly considers, discusses or rules upon any question of constitutionality in connection with this statute. In the trial court, both parties sought relief under and relied upon the statute. Mountain States, contending it was first in the field or territory, sought an injunction against Suburban in accordance with Section 69-8-3. Suburban, contending it was first in the field or territory, similarly sought an injunction against Mountain States. The ultimate finding of the New Mexico Supreme Court was that Mountain States was first to own and operate a telephone plant or equipment in the field or territory of northern Catron County (Applt's Jur. Stat. p. 47).

It is this *finding of fact*, and not the validity of the statute, that Suburban seeks to attack in this Court. The gist of the argument is stated at page 22 of the Jurisdictional Statement:

> "It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of N.M.S.A., 1953, § 69-8-1, that the first or existing public utility in the 'field' is entitled to protection from a second utility taking or destroying the

prior entrant's property (1) unless the public convenience and necessity require additional service and (2) unless the prior entrant is unable to furnish such additional service. 3 Blackstone, Commentaries *219; Schwartz v. Illinois Commerce Commission, 409 Ill. 182 (1951).

"The New Mexico Supreme Court reached its decision destroying the appellant's business and perpetuating the monopolistic business of Mountain States although by every possible criterion, discussed hereafter, the appellant was the first entrant in the field and was ready, willing and able to furnish any additional service found to be reasonably necessary."

In the first quoted paragraph, Suburban states that Section 69-8-1 embodies an elementary principle of constitutional law. The argument of the second paragraph is not that the New Mexico Court's decision interpreted the statute itself in a manner contrary to that principle of constitutional law, but that the court wrongly interpreted the evidence and hence reached an incorrect conclusion as to the facts in this case. The court, Suburban says, "reached its decision . . . although by every possible criterion . . . the appellant was the first entrant in the field."

The opinion of the New Mexico Supreme Court discusses the criteria on which the trial court based its finding that Mountain States and not Suburban was the first entrant in the field. The court considered the geography, population and industries of the area, the highways and transportation, the trade areas and the community of interest. There was evidence that "the residents have a common bond of interest by reason of their location on or near Highway 60, and the fact that their normal and usual trade area is not only among themselves but to the east at Magdalena, Socorro and Albuquerque, and to the west into Arizona, but *not* to the north." This was the conclusion of the New Mexico Supreme Court (Applt's Jur. Stat. p. 42).

There was evidence that Mountain States had served the northern Catron County area through a rancher's line from Magdalena since 1953 (R. Vol. III, pp. 332, 370; Vol. IV, p. 559). There was also evidence that Suburban owned a one-circuit private line between Salt Lake and Quemado since December 1960 (R. Vol. IV, pp. 623-624). This line was not used for telephone service offered to the public until May 29, 1961.

On this and other evidence and these criteria, the trial court found that the field or territory comprises that part of Catron County running east and west along Highway 60, and that Mountain States was the first telephone company providing service in that field or territory (R. Vol. I, p. 92).

Suburban points to other criteria which lead Suburban to a different conclusion. Perhaps a different conclusion is possible from the evidence Suburban cites, but it is not the function of this Court to review the trial court's findings, sustained on appeal, to determine whether they are supported by substantial evidence.

Further, as pointed out in the opinion of the New Mexico Supreme Court in this case, Suburban failed to comply with the rules of the New Mexico Supreme Court in attacking the findings of fact made by the trial court and therefore such findings of fact were precluded from review (Applt's Jur. Stat. p. 40).

Suburban has not raised any real question as to the constitutionality of Sections 69-8-1 through 69-8-3, N.M.S.A., 1953. Suburban sought relief in the trial court on the theory of the validity of the injunction provision of Section 69-8-3. It founded its case in the Supreme Court of New Mexico on the same theory. In its Motion for Rehearing, Suburban again relied on the same statute (Para. 2 and 4 of the Motion for Rehearing), but then, in the next paragraph, claims that the granting of injunctive relief

to Mountain States under its cross-appeal resulted in fundamental error and an invasion of Suburban's constitutional rights (Motion for Rehearing, Vol. VII, pp. 1386-1388).

Suburban's contention in this appeal is a complete reversal of the position it took in the trial court and in its Brief in Chief in the Supreme Court of New Mexico on the constitutionality of Sections 69-8-1, et seq. It was *only* in the Motion for Rehearing—after losing the case on the facts and merits—that Suburban turned about-face and attacked the injunction provision of the statute as unconstitutional.

Suburban's position in the trial court is stated in its requested conclusions of law. First it requested a conclusion that Suburban furnished telephone service in the Quemado territory prior to the time Mountain States entered the field or territory (Para. 2, R. Vol. I, p. 88). It contended that Suburban was entitled to injunctive relief against Mountain States (Para. 8, R. Vol. I, p. 89). Finally, the contention was that if Mountain States were granted its alternative prayer and permitted to duplicate Suburban's facilities, such authorized duplication would constitute a taking of Suburban's property without due process of law (Para. 5 and 6, Vol. I, p. 89).

In other words, Suburban argued that it would be deprived of its constitutional rights if it were *not* granted an injunction prohibiting Mountain States from extending its lines in the Quemado area.

Again, in the Brief in Chief in the New Mexico Supreme Court, Suburban pointed to the inconsistency of the trial court's judgment in refusing an injunction to either party. It argued that one party or the other was entitled to an injunction. It was there stated:

> "It is submitted that if all of Northern Catron County along U.S. Route 60 is properly a 'field or territory' under the statute, then one of the parties, presumably whichever one was there first, would, under

> the statute, be entitled to an injunction against the other's construction and operation." (R. Vol. VII, pp. 1203-1204)

Suburban's argument, of course, was founded on the supposition that Suburban was first in the field or territory. The facts found by the trial court in favor of Mountain States were approved by the Supreme Court, but instead of conceding that the same reasoning should apply, Suburban changes its position a full 180 degrees and argues that the injunction statute is unconstitutional. From the argument first made in the Motion for Rehearing and now presented in this Court, it can only be concluded that Suburban's theory is that if an injunction were granted against Mountain States under the statute (Sec. 69-8-3), the statute would be valid, but if the statute permits an injunction against Suburban, as ordered by the Supreme Court, then it is unconstitutional.

A litigant cannot seek relief under a statute, claiming it is valid, and then—if it is denied relief on the basis of the facts—claim that the statute is unconstitutional.

> ". . . whatever rights of property appellant claimed in respect of the specified lands, or the oysters thereon, were necessarily based upon the statute itself, and . . . he could not both assail it and rely upon it in the same proceeding." *Hurley v. Commission of Fisheries*, 257 U.S. 223 at 225 (1921)

See also, *Booth Fisheries Co. v. Industrial Commission*, 271 U.S. 208, at 211 (1926); and *Kansas City M.&B.R. Co. v. Stiles*, 242 U.S. 111 at 117 (1916).

II. Alleged Federal Questions Were Not Timely Raised, Properly Pursued, or Expressly Passed Upon

Assuming for the moment that there might be a substantial federal question involved in this case, it is clear that the question was never properly raised or preserved

by Suburban, or expressly passed upon by the New Mexico Supreme Court.

Nowhere in Suburban's Answer and Cross-Complaint in the trial court (R. Vol. I, pp. 14-23) was there any attempt to challenge the constitutionality of the New Mexico Statutes. Under New Mexico procedure, defenses not specifically raised are considered waived (N.M.S.A., 1953, Sec. 21-1-1 (8) (c) and Sec. 21-1-1 (12) (h)). These rules are nearly identical to correspondingly numbered Federal Rules of Civil Procedure.

The constitutional questions Suburban seeks to have this Court consider were not raised at all in the trial court and were not raised in the Supreme Court of New Mexico until the Motion for Rehearing was filed. In fact, Suburban's Cross-Complaint in the trial court asked for the *same* relief which is now attacked as unconstitutional.

The only constitutional question at the trial level was raised by Suburban's requested conclusions of law and was addressed solely to the alternative relief asked by Mountain States—that is, a certificate of convenience and necessity to provide duplicate service if Suburban was found to be already serving the area. At that juncture, Suburban contended that to permit duplicate service in an area already served by it would deprive it of its property without due process of law.

This same constitutional question—dealing only with the authorization of duplicate service—was the only constitutional question argued in Suburban's Brief in Chief in the New Mexico Supreme Court (R. Vol. VII, pp. 1274-1277). No question was raised by Suburban as to the constitutionality of the injunction provisions of Section 69-8-3, and indeed it could not raise any such question since Suburban itself relied on this statute in seeking an injunction against Mountain States. It was only in the Motion for Rehearing, after the case was decided against Suburban,

that it raised the constitutional question now argued in this Court.

> "It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. (Citing cases)" *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910)

See also:

Radio Station WOW v. Johnson,
326 U.S. 120, 128 (1945)

St. Louis & S. F. R. Co. v. Shepherd,
240 U.S. 240, 241 (1916)

McMillen v. Ferrum Mining Co.,
197 U.S. 343, 347 (1905), and cases there cited.

The exception to this rule is when the state court accepts the motion for rehearing and passes upon the federal question. *Forbes v. State Council of Virginia*, supra. This, however, is not the case at hand; the New Mexico Supreme Court denied, without opinion, Suburban's Motion for Rehearing (Applt's Jur. Stat. p. 49, Appendix C). Therefore, under the well-established principles of this Court, the appeal of Suburban should be dismissed.

That Suburban is aware of these patent defects in its case is apparent from its failure to make even a minimal effort to comply with Rule 15 of this Court in setting out in its Jurisdictional Statement where, when and how it raised the supposed federal questions and how the court decided these questions.

Instead, Suburban—going completely beyond the record—attempts by innuendo to impugn the integrity of the New Mexico Supreme Court (Applt's Jur. Stat., pp. 20, 33), and attempts to raise the specter of monopoly, attacking the American Telephone and Telegraph Company and the Bell System. Although Mountain States is an associated operating company of the Bell System, neither the American Telephone and Telegraph Company nor the Bell

system (not a corporate entity) were parties to any phase of this litigation.[1]

Never in the pleadings in the trial court, in the requested findings and conclusions or in the briefs in the trial court or in the Supreme Court of New Mexico did Suburban ever attempt to inject any issue or place any reliance upon antitrust or monopoly statutes—federal or state. Neither the trial nor appellate courts in New Mexico ruled upon or mentioned any such matters.

The citations, statements and arguments in Suburban's Point I under the heading "The Questions are Substantial," beginning on page 12 of the Jurisdictional Statement and continuing through several succeeding pages, are not only completely outside the record, but are superfluous, foreign and immaterial. It is inconceivable that the matter contained in these pages is pertinent or lends support to Suburban's Jurisdictional Statement.

III. There Is No Substantial Federal Question

A. *The Grounds for Jurisdiction on Appeal From an Appellate Court of a State are Narrow and Limited*

Suburban, in its Jurisdictional Statement, contends that there are substantial federal questions in this case involving impairment of the obligation of contract, due process, equal protection of the law and the taking of Appellant's property without compensation.

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[1]On July 10, 1961, Suburban filed a Complaint with the Federal Communications Commission, Docket 14199, charging both Mountain States and American Telephone and Telegraph Company with violation of the Federal Communications Act, 47 U.S.C.A. § 314, and the Antitrust Acts, 15 U.S.C.A. § 2 and § 18, and alleging that the acquisition of the lines and equipment of the Datil Cooperative would substantially lessen competition and restrict commerce in the State of New Mexico and tend to create a monopoly. By Order of the FCC released February 26, 1962, this Complaint was dismissed and a Petition for Reconsideration was denied by Order released Octiber 19, 1962. There was no appeal. The Complaint filed with the FCC had nothing whatever to do with the issues in the litigation here appealed from.

There is no substantial issue that can be considered by this Court on any of these constitutional grounds. Fundamentally, Suburban's complaint is only that the New Mexico Court has erroneously interpreted New Mexico law and incorrectly applied the statute in this case—in other words, as stated at page 20 of the Jurisdictional Statement, "the action of the Supreme Court of New Mexico in this case does not satisfy the requirements of Sections 69-8-1 through 69-8-3."

This Court's jurisdiction on appeals claiming violation of the contract clause and denial of due process or equal protection of the law is narrow and limited. The Court has ruled repeatedly that it is not concerned with the correctness of the law adopted by the appellate court of the state and its conformity with authority; that this Court does not hold the relation to the controversy between the parties which the state appellate court had; that it was the duty of the state appellate court to ascertain, declare and apply the law of the state, and its determination of that law is conclusive upon this Court; that the state court's construction of the state statutes is conclusive, and that if the question involves only the proper construction of the statute and not its validity, this Court has no jurisdiction on appeal; that there is no federal question involved in a decision on questions of compliance with the requirements of a state statute; and that this Court is not a court of appeal from the highest courts of the states, except to a very limited extent and for a precisely defined purpose.

Suburban states repeatedly in the Jurisdictional Statement that its attack is upon the statute "as interpreted" or "as construed." If Suburban is attacking the statute at all and not merely the court's findings on the evidence, it is obvious that the question is one of the proper construction of the statute and not of validity.

Central Land Co. v. Laidley,
159 U.S. 103 at 112 (1895)

Powell v. Brunswick County,
150 U.S. 433 at 439-441 (1893)

St. Paul M. and M. R. Co. v. County of Todd,
142 U.S. 282 at 287 (1892)

Sage v. Bd. of Liquidation,
144 U.S. 647 at 651 (1892)

Lehigh Water Co. v Borough of Easton,
121 U.S. 388 at 392 (1887)

Grand Gulf R. R. & Banking Co. v. Marshall,
12 Howard 165 at 168 (1851)

B. *This Case Fails to Come Within the Constitutional Guaranty Against Impairment of Contract*

Assuming arguendo that the constitutional questions sought to be reviewed were properly raised and ruled upon, the facts in this case are not such as would bring it within the constitutional guaranty against the impairment of contract obligations. The guaranties provided by Article I, Section 10, of the Constitution extend only to contracts impaired by state *legislative* action enacted *after* the execution of the contract.

Munday v. Wisconsin Trust Company,
252 U.S. 499 at 503 (1920)

Abilene National Bank v. Dolley,
228 U.S. 1 at 5 (1913)

Chicago B & Q R Company v. Cram,
228 U.S. 70 at 85 (1913)

Blackstone v. Miller,
188 U.S. 189 at 206 (1903)

Oshkosh Waterworks Company v. Oshkosh,
187 U.S. 437 at 446 (1903)

Pinney V. Nelson,
183 U.S. 144 at 147 (1901)

Lehigh Water Company v. Borough of Easton,
supra, at 391

It has been held that the proscription of Article I, Section 10, does not apply to judicial action by state courts.

Barrows v. Jackson,
346 U.S. 249 at 260 (1953) Rehearing denied 346 U.S. 841

Rooker v. Fidelity Trust Company,
261 U.S. 114 at 118 (1923)

Ross v. Oregon,
227 U.S. 150 at 161, 162 (1913)

Cross Lake Shooting and Fishing Club v. Louisiana,
224 U.S. 632 at 638 (1912)

Bacon v. Texas,
163 U.S. 207 at 216-221 (1896)

New Orleans Water Works Co. v. Louisiana Sugar Refining Co.,
125 U.S. 18 at 30, 38 (1888)

This rule applies even in the situation where a state court may have erroneously construed state law enacted prior to the time of the execution of the contract.

Long Sault Development Company v. Call,
242 U.S. 272 at 277, 280 (1916)

Central Land Company v. Laidley,
supra, at 110, 111

Lehigh Water Company v. Easton,
supra, at 392

Sections 69-8-1, et seq., N.M.S.A., 1953, were enacted in 1941. Suburban was incorporated in New Mexico in September 1960, and acquired its county franchise on January 3, 1961. Any contract it might have entered into, including the franchise, was taken subject to the provisions of existing law, including the requirement that the grantee comply with Section 69-8-1 if it intended to serve an area already served by another company.

A franchise granted by a county under Section 68-1-3, N.M.S.A., 1953, extends to the grantee nothing more than a permissive right to use the highways for the location of its distribution plant. An examination of the Suburban franchise shows on its face that it does not purport to grant

territorial operating rights (franchise is quoted in Jurisdictional Statement, pages 30 and 31). In spite of language to the contrary in Suburban's franchise, a county has no authority to grant an exclusive right to occupy its highways since exclusive franchises are prohibited by the New Mexico Constitution (Article IV, Section 26).

Suburban discusses its Catron County franchise in its Jurisdictional Statement (pp. 30-33). There might be an implication from the argument that territorial operating rights may be established through the existence of a county franchise. Under the laws of New Mexico, territorial rights may be established only by a prior occupancy or, in the alternative, by a proceeding for a certificate of convenience and necessity under Sections 69-8-1 through 69-8-3. A franchise is merely a grant of the right to use highways, streets and alleys. *Roswell v. M.S.T. & T. Co.*, 78 F.2d 379, 383-384 (CCA 10, 1935); followed with approval by the New Mexico Supreme Court in *Ruidoso v. Ruidoso Tel. Co.*, 200 P.2d 713 (1948).[2]

The holding in these cases makes it unequivocally clear that a franchise is not a certificate of convenience and necessity and that under the current New Mexico statutes as so interpreted, a franchise is not a grant of territorial operating rights in the sense of a protected right to serve the public within a defined area.

From these holdings it is equally clear that a franchise granted by a city or county extends nothing more than a permissive right for a utility to use the highways, streets and other public places for the placement of its transmission and distribution plant. If a utility could find a way to distribute its services without using the highways, streets and alleys, a franchise would not be necessary.

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[2]Compare *Agua Pura Co. v. Las Vegas*, 60 P. 208 (1900) and *M.S.T. & T. Co. v. Town of Belen*, 244 P.2d 1112 (1952), also interpreting New Mexico franchise statutes, but these decisions were limited to a construction of the state statutes as they existed prior to 1909 and they applied to franchises granted before 1909.

There are many cities and counties in New Mexico today where utility services are provided without the benefit of any franchise whatsoever.

The penultimate paragraph of the decision here attacked on appeal (Applt's Jur. Stat., p. 47) reaches the same conclusion by ruling that since Mountain States was first to occupy the northern Catron County field or territory, Suburban "before it would have the right to operate in Quemado or any other part of the area involved, must have obtained a certificate of convenience and necessity as required under the statute" (referring to Section 69-8-1), and, accordingly, the injunction applied for by Mountain States was improperly denied. In other words, the granting of a franchise by county authorities does not excuse the grantee from complying with the requirements of Section 69-8-1, et seq., if the territory involved is already occupied by another utility.

No issue concerning the Suburban franchise was raised in the pleadings in the trial court. The findings of fact and conclusions of law requested by Suburban did not refer to or depend upon the franchise (R. Vol. I, pp. 83-90), and neither the trial court nor the Supreme Court passed on the franchise matter since, as stated above, it was first raised in Suburban's Petition for Rehearing in the Supreme Court.

Previously, in briefing the issues on appeal, Suburban's only reference to the franchise is one sentence appearing in its Brief in Chief (R. Vol. VII, p. 1268) stating: "In January 1961 it obtained a County Franchise from the County Commissioners of Catron County." Both parties to this controversy knew that whatever contract or property rights they acquired in the Quemado area would necessarily be affected by a judicial interpretation of the statute and a judicial application of the statute to the facts of this case. Suburban's complaint now is nothing more than that it lost the case. A ruling against one party does

not constitute a basis for invoking the obligation of contracts clause. For more extensive discussion of the franchise issue, see Mountain States' Answer Brief to Appellant's Motion for Rehearing (R. Vol. VII, pp. 1457-1459).

C. *On the Facts Surrounding This Litigation There is No Merit to a Claim of Confiscation or Taking of Property Without Due Process of Law*

For several years prior to 1959, there were requests from residents of northern Catron County for Mountain States to extend its facilities in that area. In October 1959 and again in May 1960, at mass meetings of the local residents in the area attended by representatives of Mountain States, firm commitments were made to extend facilities in this area so as to provide exchange and long-distance service to communities along U.S. Highway 60 (R. Vol. III, p. 336, 357, 464; Vol. IV, pp. 554-555, 557-558; Exh. 22, Vol. VI, pp. 968-977).

The trial court found, and the Supreme Court approved the findings, that Mountain States began serving the area as early as 1953 (R. Vol. I, p. 92). As early as December 1960, and again in April and May 1961, representatives of Suburban were informed of the plan of Mountain States to serve the Quemado area, and this was reiterated by others (R. Vol. III, pp. 426-428, 430, 432; Vol. IV, p. 516; Exh. 26, Vol. ~~IV~~ V, p. 983). According to the announced and approved plans, Mountain States was to construct and cut into service a local exchange at Datil by July 23, 1961, and a similar local exchange in Quemado by December 17, 1961 (R. Vol. III, pp. 358, 453, 488; Exh. 19, Vol. ~~IV~~ V, pp. 962-963; Exh. 42, Vol. VI, p. 1004). By these agreed plans existing facilities and service were to be extended farther westward in northern Catron County to serve both Datil and Quemado.

It was engaged in carrying out that project when Suburban, suddenly and without warning, built its lines southward from the operations in Valencia and McKinley

Counties, purchased an existing private line between Salt Lake, New Mexico, and Quemado, and completed a one-circuit long-distance line available for connection in Gallup by May 29, 1961 (R. Vol. IV, p. 624). In view of the information possessed by Suburban as to the intent, plans and commitment of Mountain States, there can be no doubt but that Suburban made a hurried effort at territory jumping (R. Vol. IV, pp. 563-564).

Certainly from July 25, 1961—the date the original Complaint was filed, seeking injunctive relief—and Suburban's Answer to the Complaint, also requesting injunctive relief—there can be no doubt whatever but that the parties and their respective customers then knew that the Quemado area was in controversy. Under these circumstances, both parties well knew and understood—or should have—that the construction of any plant facilities in the Quemado area and the investment required therefor were a calculated risk and done at the peril of the party making the extension or investment. Particularly after the commencement of the litigation in July 1961, both parties were charged with the knowledge that there was a risk of losing the investment, depending upon the outcome of the litigation. As conceded by Suburban in its Jurisdictional Statement (p. 11), most of its investment in the Quemado area came after the litigation was commenced. Mountain States well understood this risk when it extended its toll lines westward from Datil to a point three miles east of Quemado even though this action was approved by an order of the New Mexico State Corporation Commission. (For copy of the Commission Order, see Exh. 50, R. Vol. VI, pp. 1017-1032)

When a party is and has been involved in litigation, has had its day in court, and the ultimate issues *on the facts* are resolved against that party, it cannot then claim a taking of its property without due process of law.

"The claim that the court, in disposing of some

of the questions, including that of estoppel, misconceived or misapplied the statutory and common law of the state and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrig. District v. Farmers Mut. Canal Co.*, 243 U.S. 157 at 165, 166 (1917) and cases cited therein.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States." (citing cases) *Central Land Company v. Laidley*, supra, at 112.

Similarly see:

Goltra v. Weeks,
271 U.S. 536 at 550 (1926)

Chicago Life Insurance Co. v. Cherry,
244 U.S. 25 at 30 (1917)

Tracy v. Ginzberg,
205 U.S. 170 at 177-178 (1907)

12 Am. Jur., Constitutional Law, sec. 577
at pages 273-274

To the same effect is *Dreyfus v. City of Socorro*, 189 P.2d 878 at 880 (1920), in which a holding of the New Mexico Supreme Court was made that a legislative act claimed to deprive the City of Socorro of its property without due process of law is disposed of upon two considerations, ". . . First, a full judicial hearing is accorded to the City; . . ."

IV. The Judgment Rests On Adequate Non-Federal Grounds

This Court will not review a state court decision where there is an adequate non-Federal basis to support the judgment.

Rule 16(b) of the Revised Rules of the Supreme Court of the United States

Stembridge v. State of Georgia, 343 U.S. 541 at 547 (1952)

Radio Station WOW v. Johnson, supra at 129

Williams v. Kaiser, 323 U.S. 471 at 477 (1945)

Suburban completely failed to comply with the rules of the New Mexico Supreme Court governing the review of findings of fact by the trial court. The court stated (p. 40 of Jurisdictional Statement):

> "The above facts as found by the court are set out in appellant's brief in chief, in which an attempt is made to attack most of them as contrary to evidence. The attack, such as it is, directs our attention to the contrary evidence, but neglects to point out the evidence in support of the findings. This is in direct violation of Rule 15(6) (§21-2-1(15) (6), N.M.S.A. 1953), *Minor v. Homestake-Sapin Partners Mine*, 1961, 69 N.M. 72, 364 P.2d 134, and *we will not disturb the findings of the trial court where the rule is not observed.*" (Emphasis added)

For the reason stated, based upon New Mexico law, the trial court's findings were conclusive and could not be reviewed by the New Mexico Supreme Court. Those findings were that all of northern Catron County was one field or territory and that Mountain States was first to occupy that territory.

The applicable law is stated by Suburban at page 22 of the Jurisdictional Statement:

> "It is an elementary principle of both public utility law and constitutional law, as well as the statutory mandate of N.M.S.A., 1953, § 69-8-1, that the first or existing public utility in the 'field' is entitled to protection from a second utility taking or destroying the prior entrant's property (1) unless the public convenience and necessity require additional service and (2) unless the prior entrant is unable to furnish such additional service."

The Supreme Court's function was simply to apply the law to the facts found by the trial court. This the Court did by granting to Mountain States an injunction based upon its prior occupation of the field or territory.

Further, the New Mexico Supreme Court had no obligation to consider any supposed constitutional questions in view of the failure of Suburban to properly plead or raise these questions (N.M.S.A., 1953, Sec. 21-2-1(20) (2)), and the U.S. Supreme Court has said:

> "(W)e do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties." *Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 at 296 (1941)

CONCLUSION

The appeal is not within this Court's jurisdiction. The federal questions sought to be presented were not timely raised or expressly passed on in the state court's, nor are they substantial. Finally, the state court's judgment rests upon an adequate non-federal basis. It is respectfully submitted that for all of these reasons the appeal should be dismissed.

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